UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO DIVISION OF JUDGES

Cases 37-CA-6601
37-CA-6642
37-CA-6669
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37-CA-6878

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SUPPLEMENTAL DECISION ON REMAND

Mary Miller Cracraft, Administrative Law Judge: In *Turtle Bay Resorts*, 353 NLRB No. 127, slip opinion at pp. 2-3 (March 31, 2009), the Board severed and remanded a single issue. That issue is whether Respondents violated Section 8(a)(1) and (5) of the Act¹ by unilaterally requiring Union agents to pay for parking, which Respondents had previously validated, when the agents visited the resort for representational purposes.

Judge Gontram, who heard the underlying cases, found that the longstanding practice of validating the Union agents' parking receipt was a term and condition of employment, but because there was no evidence in the record concerning the fees charged, Judge Gontram concluded it was not evident that the change was material, substantial, and significant such that it required bargaining before making the change. The Board severed and remanded this issue for reexamination in light of the fact that there was evidence in the record that showed that the parking fees assessed totaled approximately \$2,080 per year since 2005.

¹ 29 U.S.C. §158(a)(1) and (5).

Following the remand, the parties were invited to brief this issue.² Although Respondents initially took the position that briefing was inappropriate because the remand was on appeal to the Fifth Circuit Court of Appeals together with the portion of the case not remanded, I found that the remand was not a final order on appeal to the Fifth Circuit and thus overruled Respondents' opposition to briefing the remanded issue. Respondents and the General Counsel filed briefs regarding the remand.

Having fully considered these briefs, I find that rescission of the parking validation practice was a material, substantial, and significant change. Thus, I find that Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating parking validation for Union agents who were present at the resort to perform representational duties pursuant to the terms of the expired collective-bargaining agreement.

Findings of Fact³

Respondents operate Turtle Bay Hotel and Resort in Kahuku, Hawaii, on the island of Oahu. The Union represents about 360 employees at the resort. The parties' most recent collective-bargaining agreement expired on November 25, 2003. For the most part, the parties continued to observe the terms of the expired contract. Dating from at least 2002, Union business agents routinely visited the resort on a twice-weekly basis in order to perform such representational duties as meeting with employees, discussing Union-related matters, assisting employees, meeting with management, and processing grievances. Beginning in May 2004, following rescission of dues deduction, the Union agents also sought to collect Union dues. Respondents' practice was to validate the parking for Union agents. Validation continued, at least for a time, following expiration of the contract.

By letter of January 25, 2005, Respondents informed the Union that its representatives would no longer receive free parking at the resort to visit employees. Respondents instituted this change without notifying the Union or giving it an opportunity to bargain. The practice of providing free parking to the Union representatives while on the property on official business was known and facilitated by Respondents. Business agents had to pass by a kiosk in the driveway in order to access the parking lot. The parking attendant routinely gave the business agents parking tickets and the business agents validated these tickets with Respondents' security or with Respondents' human resources department. There is no evidence that the resort charges anyone other than the business agents for parking at the resort. Indeed, Respondents admitted providing free parking to the public for use the beach.

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² The parties were advised that four issues might be briefed as follows: (1) Is the subject of parking privileges for Union representatives who are present at an employer's premises pursuant to a contractual access provision a mandatory or permissive subject of bargaining? (2) If such parking privileges (valued at \$2080 per year) are a mandatory subject of bargaining, is the unilateral rescission of such privileges a material, significant, and substantial change? (3) If such parking privileges are a permissive subject of bargaining, does an employer commit an unfair labor practice in unilaterally rescinding the parking privileges? (4) Are any or all of the above questions within the scope of the remand?

³ Judge Gontram made findings of facts in his initial decision. Those facts as well as the additional facts noted by the Board in *Turtle Bay Resorts, supra,* are included.

Rescission of the parking validation practice must be viewed in the context of the other actions between Respondents and the Union. After expiration of the contract on November 25, 2003, the Union launched a campaign to secure a new contract including rallies, picketing, and a boycott of the resort. On February 14, 2004 security officers at Turtle Bay issued a trespass order to Union business agent Marian Marsh while she was present at the resort to engage in representational duties, in an attempt to try to prohibit her from accessing the property for one year. The trespass notice was issued pursuant to section 708-814 of the Hawaii Revised Statutes, even though that statute provides that it does not apply to "any conduct or activity subject to regulation by the National Labor Relations Act."

Four days later, on February 18, 2004, Marsh and another business agent were issued additional trespass notices while in the employee cafeteria speaking with a unit member. The security guard informed the business agents that he was directed to call the Honolulu police department upon seeing any Union representatives on the property without regard to whether they were on the grounds to talk to the employees they represented.

On March 25, 2004, Respondents' security officers used video cameras in order to engage in surveillance of employees and Union representatives who were participating in a rally in support of Turtle Bay employees. Following this rally, Respondents assigned security officers to "shadow" within several feet Union representatives whenever they were on the property. Judge Gontram found that "the Respondents reaction to the rally — to shadow Union representatives whenever they came onto the property — was neither effective nor focused nor reasonable. It was retaliatory and was designed to intimidate and provoke the Union, while interfering with the Union's ability to perform its representation function at Turtle Bay."

On April 2, 2004, during a peaceful Union rally, the head of security of the resort sat in his vehicle pointing a video camera at participants of the rally. On April 17, 2004, during a rally in support of Turtle Bay employees, a security guard took pictures of the license plates of participants of the rally, while another security guard and a sales manager pointed video cameras at participants of the rally.

On May 4, 2004, while business agent Shimabukuro was meeting with 50 Union retirees at a public restaurant on Respondent's property, two security guards issued trespass orders to her. They also issued trespass orders to business agent Marsh as she was discussing employment matters with several employees in the employee cafeteria. The security guards informed the business agents that they were prohibited from entering the property for one year, they escorted the business agents to the parking lot, and they took photos of the license plates of the business agents' cars.

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On May 6, 2004, an official of Respondents told business agent Marian Marsh that the Union was no longer permitted to collect Union dues on Respondents' property. This occurred after the employer decided that it would no longer deduct monthly Union dues from employees' wages as was required under the expired contract. Though the employer ceased deducting dues, it continued to comply with most other provisions of the expired contract.

On June 7, 2004, Marsh was meeting with employees in the employee cafeteria when she was approached by two security guards employed by Respondents and a Honolulu police officer and issued a trespass notice. On June 11, 2004, Marsh was issued a trespass notice for the mistaken belief that she arrived too early at the resort. On that same day, security guard Hanohano was assigned to shadow Marsh, and he followed her within 2-3 feet for the entire

time she was on the property, except when she used the women's restroom, where he waited for her outside the door.

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On June 12, 15, and 17, 2004, while Marsh was talking with employees in the employee cafeteria, she was issued a series of trespass notices without being given reasons. On June 22, 2004, while business agent Shimabukuro was collecting Union dues in the employee cafeteria, Respondents had a Honolulu police officer escort Shimabukuro off the property. On August 6, 2004, business agent Nate Santa Maria was shadowed by a security officer and then told to leave the property after he talked to employees at their work stations. He spoke with each worker at their workstations for approximately 15-20 seconds, and security claimed that he was disturbing the workers. When Santa Maria asserted that it was his contractual right to talk with the employees, there was a 45 minute standoff in full view of the employees, which ended with Santa Maria being escorted off the property.

On October 22, 2004, General Manager Abid Butt distributed a memorandum to all Turtle Bay employees which stated in part that the Union's attempts to get Respondents to agree to a new contract will fail. The memorandum stated "Unfortunately for you, your families, and for everyone associated with Turtle Bay, the Union has made a terrible mistake. We would rather close the Resort than allow you and your families to be used as hostages."

Since January 2005, a security guard has shadowed Union representatives as they visit the employees. Employees and Union representatives have tried to meet in the parking lot in order to talk beyond earshot of security guards, but on several occasions in February and March of 2005, the security followed the employees and business agents through the parking lots.

On January 19, 2005, business agents Kimberly Harmon and Laura Moye were shadowed by security when they attempted to visit employees. The security guard yelled at the business agents in front of the employees and eavesdropped on their conversations with a notebook. When an employee greeted business agent Moye, the security guard told the employee, "You know better than that."

On January 27, 2005, two days after revocation of the parking validation practice, upon her return to work after a back injury, business agent Marsh went to the resort to collect Union dues. Marsh was dropped off at the resort because her back problem made it too difficult to climb the stairs at the loading dock where she usually entered. She sat in a couch in the hotel lobby while she waited for her colleague to park the car, but the head of security told her that she was not allowed to sit on the couch or be in the lobby. Marsh complied and when she and her colleague tried to use an elevator to get to the employees, the security guard held the door and would not allow her to use that elevator. Marsh tried to use a different elevator, and the security guard stood in front of her and bumped her in order to prevent her from using that elevator. Marsh sat on a bench because her back was causing her significant pain, and the security guard called a Honolulu police officer and told him that Marsh was causing a disturbance and had no right to be on the property.

Judge Gontram found that all of the above actions by Respondents, with the exception of rescission of parking validation practices, violated Section 8(a)(1) of the Act. Thus he found that Respondents violated the Act by telling Union representatives that they were trespassing, that they had not right to be a the resort, by telling the Union that it could not collect dues at the resort, by summoning police to assist in evicting the Union representatives from the resort, by summoning police to witness service of trespass notices to the Union agents, by issuing trespass notices, by evicting Union representatives from the resort, by illegally surveilling Union representatives and employees, by illegally denying Union demonstrators and employees

access to a public beach adjacent to the resort, by threatening to discipline employees who talked to Union representatives at the resort, and by threatening to close the resort in retaliation for employees' Union activity. The Board affirmed these findings.

Judge Gontram found that the change in parking validation practices for business agents who were present at the resort to perform representational duties pursuant to the terms of the collective-bargaining agreement was a term and condition of employment. The parties agree that this issue is not before me on remand.⁴ Although Respondents argued that the obligation to bargain was limited to the employee and employer relationship, and therefore excluded Union business agents, Judge Gontram rejected this "artificial distinction" for four reasons: (1) as the exclusive bargaining representatives of the employees, actions taken against the Union are also against the employees; (2) burdening the Union's access to employees necessarily burdens the employees' access to the Union; (3) extant authority treats Union access to employees as a mandatory subject of bargaining; and (4) Union access was provided for in the expired collective-bargaining agreement. Furthermore, Judge Gontram noted that the practice of free parking by business agents was known and facilitated by the Respondents for several years prior to rescission of the practice.

Analysis

In the instant case, Respondents unilaterally implemented a \$20 per visit parking fee upon the business agents, equaling approximately \$2,080 per year, after at least three years of providing free parking. The business agents were suddenly faced with a choice to which they had no input: pay \$20 for parking two times a week or park beyond Respondents' property line and walk approximately three-quarters of a mile to the building. The change was not caused by any outside factors that were beyond the employer's control, but rather was fully initiated and executed by the employer. See, generally, *United Parcel Service*, 336 NLRB 1134 (2001) (Where third party owned the parking facilities and third party instituted the change the employer must nevertheless bargain regarding the effects).

In determining whether the unilateral change was material, substantial, and significant, the natural context must be considered. *Microimage Display Division of Xidex Corp.*, 297 NLRB 110, 111 (1989), *enf'd* 924 F.2d 245 (D.C. Cir. 1991). When an employer takes action "as part of its concerted strategy to weaken and discredit the union in the eyes of the employees" it is proper to look at the other elements of that strategy in order to determine whether the issue is material and substantial. *Microimage Display Division of Xidex Corporation v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991), rehearing and rehearing en banc denied. In *Microimage*, the employer argued that unilaterally changing employees' lunch breaks for 2 days was *de minimis* and was not substantial enough to constitute an unfair labor practice. The Board held, and the Court agreed, that "by unilaterally implementing the change, the employer was 'telegraphing to the employees that the Union was irrelevant." *Id.* The Board held that in the context of the other actions of the employer towards the Union, the mandatory subject of bargaining of lunch hour changes for 2 days was material, substantial, and significant.

⁴ Respondents' brief states, "Finally, the questions raised by [the judge on remand] exceed the scope of the remand as the only issue the Board ordered addressed was whether the monetary amount . . . sufficed to establish that Respondents' unilateral change was material, substantial, and significant and consequently whether Respondents violated Section 8(a)(5) of the Act." General Counsel states, "Thus, the Board's remand is limited in scope to this particular issue." The issue referred to is "evidence of the monetary amounts . . . for the parking privileges unilaterally revoked by the Respondents."

Respondents in the instant case made it virtually impossible for the business agents to have meaningful contact with the employees without being shadowed or issued trespass orders. On many occasions, Respondent issued trespass notices to Union business agents while they were talking with employees about employment matters. These trespass notices barred the business agents access to the property for one year, and Respondents tried to enforce them with numerous calls to the Honolulu police. When the business agents were on the property, security guards shadowed the business agents, staying within a few feet at all times, except when the business agents used the restroom. When employees and business agents tried to take their conversations to the parking lot in order to speak in private, security guards followed them outside as well. At times, security even took photos of the license plates of business agents and security guards and a sales manger took video footage of employees taking part in rallies.

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The chronology of events illustrates amply that the change in the terms of parking was one of many means that the employer used to burden the link between the employees and their exclusive bargaining representative. Respondent's conduct itself towards the Union blocked or burdened the Union's access to the employees at every turn. Thus, Respondents' unilateral change of the parking conditions for Union business agents on the property on official business constituted a material, substantial, and significant change of employees' terms and conditions of employment.

Moreover, even in the absence of the context of Respondents actions, the amount the Union paid for parking, \$2080 per year, is a substantial amount of money, the distance walked by business agents (some of whom had physical limitations) is significant, and the time involved in walking the extra distance is substantial. Given these factors and the concerted strategy to weaken the Union's access to employees, the parking validation practice, as found by Judge Gontram, was a mandatory subject of bargaining. Unilateral alteration constituted a material, substantial, and signification change and violates 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

The Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally altering the parking validation policy for Union agents who were present at the facility to service the collective-bargaining contract.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondents Oaktree Capital Management, LLC, TBR Property, LLC, and Benchmark Hospitality, Inc., Kahuku, Oahu, Hawaii, their officers, agents, successors, and

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

assigns shall cease and desist from unilaterally altering the parking validation practice for Union agents who are present at the resort for representational duties pursuant to the terms of the expired collective-bargaining contract. Further, Respondents are ordered to reinstate the parking validation practice for business agents present at the resort for representational duties pursuant to the terms of the expired collective-bargaining contract and make whole the Union for any amounts incurred for parking after rescission of the parking validation practice as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970). It is recommended that the Order set forth in the original Decision reported at 353 NLRB No. 127, slip opinion at 3-4, be modified by addition of the following paragraphs:

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1. Cease and desist from unilaterally changing the practice of validating parking for Union business agents present at the resort for representational duties pursuant to the terms of the expired collective-bargaining agreement.

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 Take the following affirmative action necessary to effectuate the policies of the Act: Rescind the change in the parking validation practice and reinstate the practice of validation of parking tickets for Union business agents present at the resort for representational duties pursuant to the terms of the expired collective-bargaining agreement.

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3. Make the Union whole for any amounts incurred for parking after rescission of the parking validation practice.

It is recommended that the following paragraphs be inserted in the Appendix set forth in *Turtle Bay Resorts, supra,* 353 NLRB No. 127, slip opinion at 4-5:

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WE WILL NOT unilaterally rescind our parking validation practice for Union business agents who are present at the resort for representational duties pursuant to the terms of the expired collective-bargaining agreement.

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WE WILL reinstate the parking validation practice for business agents who are present at the resort for representational duties pursuant to the terms of the expired collective-bargaining agreement.

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WE WILL make whole the Union for amounts it incurred in parking fees following our rescission of the parking validation practice.

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Dated, Washington, D.C., August 17, 2009.

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Mary Miller Cracraft

Administrtive Law Judge

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